BEFORE THE DOCKET FILE COPY ORIGINAL

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Implementation of the	)	
Cable Television Consumer	)	MM Docket No. 92-266
Protection and Competition	)	
Act of 1992	)	
	)	
Rate Regulation	)	

To: The Commission

COMMENTS OF NATIONWIDE COMMUNICATIONS INC.

Nationwide Communications Inc. ("NCI"), by its attorneys, hereby files it comments in response to the Notice of Proposed Rule Making, released December 24, 1992, in the above-captioned proceeding (the "Notice").

NCI owns and operates the second largest private cable system in the United States. This private cable system serves nearly 80,000 multiple unit dwellings in Houston, Texas, via a hybrid of master antenna television systems, satellite master antenna television systems, and community antenna television systems. Service to most of these dwellings is provided pursuant to a non-exclusive franchise granted by the city of Houston, where traditional franchised cable service is primarily provided by Warner-Amex and TCI.[1] NCI also is the licensee of numerous radio and television broadcast stations throughout the United States.

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[1] NCI previously owned and operated a traditional franchised cable system in central Ohio.

Underlying the Cable Television Consumer Protection and Competition Act of 1992 (the "Act") is Congress' intent to protect consumers from unreasonable and discriminatory rates, and to promote competition in the provision of multi-channel video services.[2] Congress recognized that the accomplishment of the second goal (the emergence of true competition in this market) would itself advance the first goal (the protection of consumers).[3] In these Comments, NCI addresses two prohibitions set forth in Section 3 of the Act, i.e., the requirement for uniform geographic rate structures and the prohibition against discrimination in cable rates. These two provisions address interrelated problems, and the Commission must enact regulations that fully effectuate the

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[2] See Sections 2(a)(1), 2(a)(2) and 2(b) of the Act; See also House Committee on Energy and Commerce, H.R. Rep. No. 102-628, 102d Cong., 2d Sess. at 26 (hereinafter, the "House Report"):

> H.R. 4850 is designed to address the principal concerns about the performance of the cable industry and the development of the market for video programming since passage of the [1984] Cable Act. This legislation will protect consumers by preventing unreasonable rates ... and by sparking the development of a competitive marketplace.

[3] See House Report at 30:

> The Committee believes that competition ultimately will provide the best safeguard for consumers in the video marketplace and strongly prefers competition and the development of a competitive marketplace to regulation. The Committee also recognizes, however, that until true competition develops, some tough yet fair and flexible regulatory measures are needed.

See also Senate Committee on Commerce, Science, and Transportation, S. Rep. No. 92, 102d Cong., 1st Sess., at 18 (1991) (hereinafter the "Senate Report").

remedies proposed in these provisions if it is to accomplish Congress' goal of protecting consumers.

I. Geographically Uniform Rate Structure

Section 3 of the Act amends Section 623(d) of the Communications Act to require cable operators to "have a rate structure, for the provision of cable service, that is uniform throughout the geographic area in which cable service is provided over its system." This provision was adopted from the Senate bill (S. 12), and the Senate Committee Report on S. 12 states that the provision is "intended to prevent cable operators from dropping the rates in one portion of a franchise area to undercut a competitor temporarily."[4] As a competitor of traditional cable operators, NCI has seen such operators offer, typically to SMATV subscribers in large multiple unit dwellings, rates so drastically below standard retail price as to suggest that service was being offered at or below cost. The obvious intent in these cases was to undercut independent SMATV service.[5] This abusive tactic aims to destroy,

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[4] Senate Report at 76.

[5] The Act requires the Commission to make a finding that a cable system is not subject to "effective competition" before that system can be made subject to rate regulation. In footnote 35 of the Notice, the Commission seeks comments as to whether competitors of cable systems should be required to disclose the number of their subscribers, and other data relevant to a finding of effective competition, and whether such information, if proprietary, should be subject to special protection. "Effective competition" is defined in the Act solely in terms of the number of subscribers actually served, or to whom service is offered. Accordingly, no other information is relevant, and thus the only information, at most, that multichannel video programmers should have to provide to a regulatory authority for the purpose of making such a finding is subscriber information. However, such information is in fact confidential and proprietary commercial information, and thus should not be routinely provided to the public. See Section 0.457(d) of the Commission's Rules (records not routinely made available for public inspection by the Commission include confidential commercial information). NCI recognizes that

or prevent the rise of, competitive markets for multichannel video programming, and ultimately leads to higher rates for consumers. While the Commission has proposed a variety of methods for directly regulating unreasonable rates,[6] Congress has made it clear that it prefers competition over rate regulation as the best means for protecting subscribers from unreasonable rates.[7] Congress established the uniform geographic rate structure requirement as an important means of promoting competitive markets, and the

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subscriber information might be derived from the financial information that will be submitted to the FCC pursuant to the proposed form 326, but Sections 0.457(d)(1)(iii) and (iv) of the Commission's Rules prohibit the routine distribution of such information to the public.

While regulatory authorities must make findings regarding "effective competition," it would be ironic, and contrary to the purposes of the Act, if the procedure for doing so was itself destructive to competition. Yet, in areas where numerous providers compete in the multichannel market, making confidential proprietary subscribership information regarding one provider available to its competitors, especially information regarding a smaller more vulnerable provider, would be unfair and could substantially damage competition in a market. Therefore, the Commission should enact regulations, similar to those in Sections 0.457 and 0.459 of its Rules, requiring regulatory authorities to give special treatment to confidential proprietary data obtained pursuant to making an "effective competition" finding.

[6] See Notice at paras. 10-110.

[7] See note 3, supra, and Section 2(b) of the Act:

> It is the policy of the Congress in this Act to -- (2) rely on the marketplace, to the maximum extent feasible to achieve [diverse video programming]; [and] ... (4) where cable television systems are not subject to effective competition, ensure that consumer interests are protected in receipt of cable service....

See also amended Section 623(a)(2) of the Communications Act ("Preference for Competition").

Commission must enact regulations that fully support Congress' intent.[8]

The Commission seeks comments as to whether the term "geographic area," as used in this Section of the Act, refers to franchise areas, or areas greater than a franchise. Notice at paras. 114-115. NCI agrees with the Commission's statement (para. 115) that operations in different geographic areas may have different costs. A major factor in such distinctions is the fact that different headends may have different capabilities, resulting in different per-channel expense ratios, which may form a legitimate basis for differing rates charged to subscribers wired to those different headends. Thus, the "geographic area" in which operators must charge uniform rates should be defined as "a discrete interconnected area served by the same headend."

II. Discriminatory Rate Structures

Section 3 of the Act amends Section 623(e) of the Communications Act to state that nothing in the Act prohibits any Federal agency, State or franchise authority from:

> prohibiting discrimination among subscribers or potential subscribers to cable service, except that no [authority] may prohibit a cable operator from offering reasonable discounts to senior citizens or other economically disadvantaged group discounts ....

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[8] Congress' intent to promote competition through the uniform geographic rate requirement also "dovetails" with Section 11 of the Act, which amends Section 613(a) of the Communications Act to prohibit cable operators from providing MMDS or SMATV service, separate from and in addition to franchised cable service, in the operator's franchise area. While this cross-ownership prohibition is an attempt to prevent established cable operators from blocking or buying out competitors, the uniform geographic rate requirement is an attempt to prevent established cable operators from destroying competitors by predatory rate practices.

The Commission concludes that it should explicitly permit the "discounts contemplated in the statute." Notice at para. 117. NCI assumes that this means that new regulations will limit price discrimination to those classes of subscribers explicitly listed in the statute.[9] NCI is disturbed, however, by what may be a suggestion in paragraph 113 of the Notice that discrimination may be permissible among broader or more numerous categories of customers. Such an interpretation of amended Section 623(e)(1) is unacceptable for a number of reasons. First, it would lead to a "slippery slope" of multiplying categories of subscribers, which would quickly undermine the statutory goal of preventing price discrimination. The greater the number of such classes, the more meaningless rate structures become in protecting subscribers from price discrimination.[10] Second, provisions for numerous classes of customers, especially classes determined by individual cable operators, would likely be used by such operators in an anti-competitive manner. For example, the Commission does not propose substantial structure regulating the cost-basis for different

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[9] NCI already offers price discounts to senior citizens. The Commission should consider defining the statutory term "economically disadvantaged group" so that different rates offered to alleged members of such groups are not used in an anti-competitive manner. For example, under the guise of offering discount rates to allegedly "disadvantaged" subscribers who reside in a multiple unit dwelling, an operator could offer a dramatically low bulk discount rates with the real intention of undercutting potential competition. Regulations could base the definition of "disadvantaged" on federal poverty standards, and could require operators offering such rates to demonstrate that the subscribers meet that standard.

[10] While Section 623(e) addresses price discrimination among classes of subscribers or potential subscribers, it does not prohibit, and NCI supports, price differences based on different classes of service, involving numbers of channels, pay services, etc.

classes of customers, but without such regulation, the inflated rates from one class of subscribers could be used by an operator to subsidize the lowered rates of other subscribers, in an attempt to undercut the prices of a competitor. Such a result is clearly not contemplated in the Act,[11] and furthermore undermines the overriding goal of promoting competition.[12]

Accordingly, other than the exceptions stated in the statute, there should only be one class of private residential[13] subscribers. In no case should the Commission permit a separate class based on bulk discounts for large multiple unit dwellings. As was noted above, the offering of such rates, often at or below cost, is a common strategy used by cable operators to undercut competitors. The Commission certainly should not allow temporary classes of subscribers eligible for price reductions which have the effect of destroying competition and ultimately raising prices paid by consumers.

III. Conclusion

Ultimately, fair competition in the multichannel video market will best protect consumers from unreasonable rates, and the provisions of the Act discussed herein are tools created by Congress to promote competition in that market. The Commission

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[11] While the Act arguably approves the subsidization of rates for senior citizens and other economically disadvantaged people, the purpose and effect of such subsidization is not anti-competitive.

[12] See note 3, supra.

[13] Regulations should permit a separate rate structure for cable services offered to public commercial subscribers, such as bars and restaurants. Such subscribers essentially re-sell the value of cable programming to their patrons, and cable operators should be allowed to recover some of that value in higher rates than those charged to residential subscribers.

must enact regulations that fully effectuate the remedies proposed in these provisions, if it is to accomplishing Congress' goal of protecting consumers.

Enforcement of the Section 623(d) geographic uniform rate structure requirement is crucial to the promotion of a competitive video marketplace, and the "geographic area" in which operators must charge uniform rates should be defined as a discrete interconnected area served by the same headend. Regarding Section 623(e), in light of the pro-competition goal of Act, the Commission should affirmatively prohibit price discrimination among subscribers, and while the Act contemplates some limited classes of residential subscribers (e.g., senior citizens) who should be allowed to receive lower rates than others, this exception to the prohibition should be narrowly interpreted and limited to those classes.

Respectfully submitted,

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